

WISCONSIN SUPREME COURT
TUESDAY, DECEMBER 16, 2008
9:45 a.m.

This is a review of a decision of the Wisconsin Court of Appeals, District III (headquartered in Wausau), which affirmed an Ashland County Circuit Court decision, Judge Robert E. Eaton, presiding.

2007AP400-CR

[State v. Tody](#)

This case arises from Mark H. Tody Jr.'s conviction for operating a motor vehicle without consent as party to a crime. Tody asks the Supreme Court to review several issues stemming from the fact the trial judge's mother served on the jury that found him guilty.

Some background: The underlying facts in this case involved stealing a Jeep from the Ashland airport. The case centered on the respective roles of Tody and his two friends, Landon LaPointe and Jonathon Newago. Tody's defense was that he was merely a bystander to the crime.

Tody's jury trial occurred on June 7, 2006, before Judge Robert E. Eaton. At the end of the *voir dire*, Tody's attorney moved to strike Eaton's mother from the jury for cause, contending she might unduly influence other jurors because of her relationship to the judge. The court denied the motion, concluding there was no authority for disqualifying a juror because of her relationship to a neutral party, and that Eaton's answers during the *voir dire* indicated she would be impartial. The trial proceeded with Judge Eaton's mother on the jury, which convicted him.

Eaton sentenced Tody to three years probation. Tody filed a post-conviction motion, which was denied by the trial court. Tody appealed to the District III Court of Appeals, which affirmed the trial court.

On appeal, Tody argued he was denied a right to a fair and impartial jury because of comments made by Judge Eaton during *voir dire* and the court's decision not to strike Ms. Eaton. When asked if she had a relative employed in a law enforcement-related capacity, Ms. Eaton responded that her son was the judge. Judge Eaton then commented that he liked to consider himself "part of law enforcement, or I may be disowned."

Tody argued the judge should have recused himself from deciding whether to strike Ms. Eaton. Tody further claimed counsel was ineffective for failing to adequately prepare him for testimony, as well as failing to attempt to rehabilitate him after his testimony. Tody raised numerous issues based upon the circuit court's decision to allow the judge's mother to remain on the jury.

The Court of Appeals said that juror's relationship to a judge is not by itself a juror bias issue, a judge is not associated with either party, and that no bias is implicit from a relationship to a neutral party.

The Court of Appeals said that Tody's jury bias argument ignored the framework set forth in State v. Faucher, 227 Wis. 2d 700, 715, 596 N.W.2d 770 (1999). The Court of Appeals said that Faucher set forth three categories of bias: statutory bias, subjective bias, and objective bias, and that none of these tests were met. The juror was not related

by blood, marriage or adoption to any party or to any attorney appearing in the case or had any financial interest in the case. See Wis. Stat. § 805.08(1).

Specifically, Tody asks the Supreme Court to review:

- if he was deprived to his right to a fair and impartial jury under the state and federal constitutions.
- if the trial judge should have recused himself from deciding the motion to strike his mother.
- if he should get a new trial in the interest of justice.
- if the Court should prohibit a judge's immediate family members from serving on a jury in a case over which the judge is presiding.